

Alliance Bank Malaysia Bhd v Khee San Food Industries Sdn Bhd & Anor A

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT B
NO WA-22NCC-215-06 OF 2020
WAN MUHAMMAD AMIN JC
18 JUNE 2021

Banking — Banker and customer — Duty of care — Whether plaintiff owed Quincecare duty of care — Whether plaintiff had duty to investigate or inquire into authenticity of commercial documents — Whether plaintiff had notice of the impugned bankers' acceptance — Whether plaintiff had complied with the applicable Bank Negara Malaysia guidelines C

This was the plaintiff's applications vide encl 9 for a summary judgment under O 14 r 2 of the Rules of Court 2012 ('the ROC') and vide encl 12 to strike out the defendants' counterclaim pursuant to O 18 r 19(1)(a), (b) and/or (d) of the ROC and/or under the inherent jurisdiction of the court. Both applications were heard together. The plaintiff had granted to the first defendant, a wholly owned subsidiary of the second defendant, several banking facilities subject to the terms and conditions contained in the letter of offer dated 19 April 2013 and facility agreement dated 31 May 2013 ('agreement'). The banking facilities granted were: (a) the 'omnibus trade facilities' consisting, letter of credit, trust receipt, bankers' acceptance ('BA'), foreign currency trade loan, shipping guarantee and bank guarantee of RM10m; and (b) the forward foreign exchange of RM1m. The facilities were secured by, inter alia, a letter of guarantee dated 31 May 2013 executed by the second defendant to guarantee payment under the agreement, subject to a principal limit of RM11m together with interest. The manner in which the BA transaction operated under the facilities were: (i) funds were paid out by the plaintiff under the facilities upon the application of the first defendant which application must be properly supported by third party trade documents; and (ii) the plaintiff then pays the third party and debits the first defendant account, who then has the agreed number of days by which repayment must be made to the plaintiff ('maturity date'). The earliest maturity date fell due on 3 May 2019 and the first defendant defaulted on the repayment of the BA. Out of 21 BA transactions, the defendants disputed three BA transactions amounting to a principal amount of RM892,000 ('impugned BA'). On 19 August 2019, the plaintiff through its solicitors, issued the two letters of recall cum demand to the first defendant in respect of the default in repayment and to the second defendant as guarantor. The plaintiff's claim against the defendants arose from the default in payment by the first defendant and the second defendant as the first defendant's guarantor. The reliefs the plaintiff essentially sought were: (A) judgment sum of D
E
F
G
H
I

- A RM4,701,013.30 as at 18 May 2020 under the omnibus trade (BA) facility;
(B) continuing interest on the overdue principal sum of RM4,277,000 at the
rate of 4%pa above the plaintiff's base lending rate ('BLR') and penalty interest
at the rate of 1%pa calculated on daily rest from 19 May 2020 until the date of
full settlement; (C) reimbursement of the plaintiff's legal cost of RM7,497.70;
B and (D) costs. In defence, the defendant contended that the plaintiff was
negligent in allowing the drawdown of RM892,000 based on forged and/or
fictitious supporting documents that were submitted for the three BA
transactions and counterclaimed against the plaintiff for: (1) damages for
negligence; (2) an account of all monies drawn down by virtue of fictitious
C invoices presented to the plaintiff; (3) an account of all monies paid by the first
defendant to the plaintiff; (4) an account to be taken of what was due by the
first defendant to the plaintiff or vice versa; (5) all further proper accounts,
inquiries and directions; and (6) an order for payment of any sum due by the
plaintiff to the defendant. The main issue that arose for determination was
D whether the plaintiff owed the defendants the *Quincecare* duty of care.

Held, allowing the plaintiff's applications with costs:

- (1) The court was of the considered view that the *Quincecare* duty did not
E apply to this case. The *Quincecare* duty was a duty founded upon the law
of tort or was otherwise said to be tortious duty of care. It was not
contractual. The duty was imposed on the actual knowledge of the bank
and not 'constructive' knowledge. There were qualifications for the
applicability of the *Quincecare* duty and it did not apply in all situations
F where there was a banker-customer relationship. The *Quincecare* duty
only applied to instructions by the customer involving the customer's
own account with the bank, and where it pertains to money moving out
of that account. The bank was considered the 'custodian' of the
customer's money. As a 'custodian' and agent of the customer, the bank
G needed to be extra careful. This was to be compared to monies which
were borrowed from the bank such as in the instant case. The BA
transactions involved the plaintiff bank's own funds and not the first or
second defendant. Here the plaintiff bore the greater risk. Another reason
the *Quincecare* duty could not apply in the present case was due to the fact
H that its application was further limited to rare and exceptional cases
requiring a high threshold (see para 98).
- (2) It was trite that a party could not claim benefit from a
transaction/contract and at the same time seek to invalidate it. The
defendants could not be allowed to approbate and reprobate, and claim
I restitution of monies paid on the alleged fictitious transactions and on
the other hand seek to invalidate the BA transactions. None of the issues
raised by the defendants in this case were triable issues. There was also no
conflict of evidence as to facts. In the circumstances, the defendants had
no cause of action against the plaintiff and their counterclaim was

frivolous, vexatious or otherwise an abuse of the process of the court. The second defendant, as a guarantor, had no right to its counterclaim against the plaintiff as it was not a party to the BA and could not be said to have suffered any loss (see paras 144–145, 148 & 150).

A

[Bahasa Malaysia summary]

B

Ini adalah permohonan plaintiff melalui lampiran 9 untuk penghakiman terus di bawah A 14 k 2 Kaedah-Kaedah Mahkamah 2012 ('KKM') dan melalui lampiran 12 untuk membatalkan tuntutan balas defendan berdasarkan A 18 k 19(1)(a), (b) dan/atau (d) KKM dan/atau di bawah bidang kuasa sedia ada mahkamah. Kedua-dua permohonan tersebut didengar serentak. Plaintiff telah memberikan kepada defendan pertama, anak syarikat milik penuh defendan kedua, beberapa kemudahan perbankan yang tertakluk pada terma dan syarat yang terdapat dalam surat tawaran bertarikh 19 April 2013 dan perjanjian kemudahan bertarikh 31 Mei 2013 ('perjanjian'). Kemudahan perbankan yang diberikan adalah: (a) 'kemudahan perdagangan omnibus' yang terdiri daripada, surat kredit, resit amanah, penerimaan jurubank ('BA'), pinjaman perdagangan mata wang asing, jaminan perkapalan dan jaminan bank sebanyak RM10 juta; dan (b) pertukaran wang asing hadapan sebanyak RM1 juta. Kemudahan tersebut dijamin dengan, antara lain, surat jaminan bertarikh 31 Mei 2013 yang ditandatangani oleh defendan kedua bagi menjamin pembayaran berdasarkan perjanjian tersebut, dengan syarat had utama RM11 juta berserta faedah. Kaedah di mana transaksi BA beroperasi di bawah kemudahan tersebut adalah: (i) dana telah dibayarkan oleh plaintiff di bawah kemudahan tersebut setelah permohonan oleh defendan pertama yang mana permohonannya harus disokong oleh dokumen perdagangan pihak ketiga; dan (ii) plaintiff kemudiannya membayar pihak ketiga dan mendebitkan akaun defendan pertama, yang kemudiannya mempunyai bilangan hari yang telah dipersetujui pembayaran mesti dibuat kepada plaintiff ('tarikh matang'). Tarikh matang paling awal jatuh pada 3 Mei 2019 dan defendan pertama gagal membayar balik BA. Daripada 21 transaksi BA, defendan mempertikaikan tiga transaksi BA berjumlah RM892,000 ('BA yang disangkal'). Pada 19 Ogos 2019, plaintiff melalui peguamnya, telah mengeluarkan dua surat penarikan balik dan tuntutan kepada defendan pertama berkenaan dengan kegagalan pembayaran balik dan kepada defendan kedua sebagai penjamin. Tuntutan plaintiff terhadap defendan timbul dari kegagalan pembayaran balik oleh defendan pertama dan defendan kedua sebagai penjamin defendan pertama. Relif yang dituntut oleh plaintiff adalah: (A) jumlah penghakiman sebanyak RM4,701,013.30 setakat 18 Mei 2020 di bawah kemudahan perdagangan omnibus (BA); (B) faedah berterusan ke atas jumlah pokok tertunggak berjumlah RM4,277,000 pada kadar 4% setahun melebihi kadar pinjaman asas plaintiff ('BLR') dan faedah penalti pada kadar 1% pa yang dikira pada kadar faedah harian dari 19 Mei 2020 sehingga tarikh penyelesaian penuh; (C) pembayaran balik kos guaman plaintiff sebanyak RM7,497.70; dan (D) kos. Sebagai pembelaan, defendan berpendapat bahawa plaintiff telah cuai

C

D

E

F

G

H

I

- A degan membenarkan pengeluaran RM892,000 berdasarkan dokumen sokongan palsu dan/atau rekaan yang dikemukakan bagi ketiga-tiga transaksi BA dan membuat tuntutan balas terhadap plaintif untuk: (1) ganti rugi kerana kecuai; (2) akaun kesemua wang yang dikeluarkan berdasarkan invois rekaan yang dikemukakan kepada plaintif; (3) akaun kesemua wang yang dibayar oleh B defendan pertama kepada plaintif; (4) akaun yang harus diambil kira apa yang kena dibayar oleh defendan pertama kepada plaintif atau sebaliknya; (5) semua akaun, pertanyaan dan arahan yang suaimanfaat; dan (6) perintah pembayaran sejumlah wang yang kena dibayar oleh plaintif kepada defendan. Isu utama yang timbul untuk ditentukan adalah sama ada plaintif tugas *Quincecare* C terhadap defendan.

Diputuskan, membenarkan permohonan plaintif dengan kos:

- D (1) Mahkamah berpendapat bahawa tugas *Quincecare* tidak terpakai untuk kes ini. Tugas *Quincecare* adalah tugas berdasarkan undang-undang tort atau sebaliknya dinyatakan sebagai tugas berhati-hati tort. Ianya bukan kontraktual. Tugas tersebut dikenakan atas pengetahuan sebenar bank dan bukan pengetahuan 'konstruktif'. Terdapat keperluan bagi E penggunaan tugas *Quincecare* dan tidak terpakai dalam semua situasi di mana terdapat hubungan jurubank-pelanggan. Tugas *Quincecare* hanya terpakai pada arahan oleh pelanggan yang melibatkan akaun pelanggan sendiri dengan bank, dan di mana ia berkaitan dengan wang yang keluar dari akaun tersebut. Bank tersebut dianggap sebagai 'penjaga' wang F pelanggan. Sebagai 'penjaga' dan ejen pelanggan, bank perlu berhati-hati. Ini dapat dibandingkan dengan wang yang dipinjam dari bank seperti dalam kes semasa. Transaksi BA melibatkan dana bank plaintif sendiri dan bukannya defendan pertama atau kedua. Di sini, plaintif menanggung risiko yang lebih besar. Alasan lain bahawa tugas *Quincecare* G tidak dapat terpakai dalam kes semasa adalah kerana fakta penggunaannya adalah terbatas pada kes-kes yang jarang dan luar biasa yang memerlukan ambang tinggi (lihat perenggan 98).
- H (2) Ia adalah jelas bahawa pihak tidak dapat menuntut keuntungan dari transaksi/kontrak dan pada masa yang sama berusaha untuk membatalkannya. Defendan tidak boleh dibenarkan untuk approbate dan reprobate, dan menuntut restitusi wang yang telah dibayar atas dakwaan transaksi palsu dan pada masa yang sama berusaha untuk membatalkan transaksi BA. Tiada satu pun isu yang dibangkitkan oleh I defendan dalam kes ini adalah isu yang harus dibicarakan. Tidak ada konflik keterangan pada fakta. Dalam keadaan seperti itu, defendan tidak mempunyai kausa tindakan terhadap plaintif dan tuntutan balas mereka adalah remeh, menyusahkan atau seterusnya adalah penyalahgunaan proses mahkamah. Defendan kedua, sebagai penjamin, tidak mempunyai hak atas tuntutan balas terhadap plaintif kerana ia bukan pihak kepada BA dan tidak boleh dikatakan mengalami sebarang

kerugian (lihat perenggan 144–145, 148 & 150).]

A

Cases referred to

Abani Trading Pte Ltd v BNP Paribas and another appeal [2014] SGHC 111, HC (refd)

Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors [2006] 5 MLJ 1, FC (refd)

B

Alliance (Malaya) Engineering Co Sdn Bhd v San Development Sdn Bhd [1974] 2 MLJ 94, FC (refd)

Aseambankers Malaysia Bhd & Ors v Shencourt Sdn Bhd & Anor [2014] 4 MLJ 619, CA (refd)

C

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Barclays Bank plc v Quincecare Ltd and another [1992] 4 All ER 363, QBD (distd)

Boey Oi Leng (t/a Indah Reka Construction & Trading) v Trans Resources Corporation Sdn Bhd [2001] MLJU 566; [2002] 1 CLJ 405; [2001] 4 AMR 4807, HC (refd)

D

Chang Yun Tai & Ors v HSBC Bank (M) Bhd and other appeals [2014] 1 MLJcon 134, FC (folld)

Federal Republic of Nigeria v JP Morgan Chase Bank, NA [2019] EWHC 347 (Comm), QBD (refd)

E

Gian Singh & Co Ltd v Banque de l'Indochine [1974] 2 All ER 754, PC (refd)

Gisco Sdn Bhd v Blackgold (M) Sdn Bhd [1988] 2 MLJ 397 (refd)

Lee Cheong Chee v HSBC Bank Malaysia Bhd [2021] MLJU 574, HC (refd)

Lipkin Gorman (a firm) v Karpnale Ltd and another [1992] 4 All ER 409, CA (folld)

F

Malayan Banking Bhd v Punjab National Bank [2018] MLJU 1716, HC (refd)

Malayan Banking Bhd v Lim Poh Ho & Anor [1997] 1 MLJ 662; [1997] 2 CLJ 516, CA (refd)

Maybank Islamic Berhad v Aldwich Enviro-Management Sdn Bhd [2015] MLJU 1977; [2015] 1 LNS 1300, HC (refd)

G

Middy Industries Sdn Bhd & Ors v Arensi-Marley (M) Sdn Bhd [2013] 3 MLJ 511; [2012] 1 LNS 830, CA (refd)

National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300; [1984] 1 CLJ Rep 283, FC (refd)

H

OCBC Bank (Malaysia) Bhd v Siong Holdings Sdn Bhd [1996] MLJU 253, HC (refd)

Pembinaan V-Jaya Sdn Bhd v Binawisma Development Sdn Bhd [1987] 1 MLRH 287; [1987] CLJ Rep 823, HC (refd)

Public Bank Bhd & Anor v Exporaya Sdn Bhd [2013] 1 MLJ 507, CA (distd)

I

Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16; [1993] 3 CLJ 606, SC (refd)

Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1, FC (refd)

- A** *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50, SC (refd)
Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd [1986] AC 80, PC (refd)
Talam Corp Bhd & Anor v Bangkok Bank Bhd & Anor [2016] 6 MLJ 61; [2016] MLRAU 1, CA (refd)
- B** *Technointan Holding Sdn Bhd v Tetuan Tan Kim Siong & TBH Hong Jet* [2007] 1 MLJ 163; [2006] 7 CLJ 541, HC (refd)
Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals [1996] 1 MLJ 661; [1996] 1 CLJ 393, CA (folld)
- C** *United Malayan Banking Corporation Bhd v Datin Theresah bte Abdullah & Anor* [1994] MLJU 273; [1994] 2 MLRH 366, HC (refd)
Verschures Creameries, Limited v Hull and Netherlands Steamship Company, Limited [1921] 2 KB 608, CA (refd)
Woolley Development Sdn Bhd v Mikien Sdn Bhd [2008] 1 MLJ 585; [2008] 2 CLJ 303, CA (folld)
- D** *Zulpadli bin Mohammad & Ors v Bank Pertanian Malaysia Bhd* [2013] 2 MLJ 915, CA (refd)

Legislation referred to

- Companies Act 2016 s 7
- E** Rules of Court 2012 O 14, O 14 rr 1(1), 2, 3(1), 4(1), O 18, O 18 r 19, 19(1)(a), (1)(b), (1)(c), (1)(d), O 81
- Benjamin John Dawson (Koh San Tee and Fiona Quay Hui with him) (Benjamin Dawson) for the plaintiff.*
- F** *Owee Chia Ming (Krishna Kumar, Shermaljit Singh and Lew Wei Hung with him) (Krish Maniam & Co) for the defendants.*

Wan Muhammad Amin JC:

- G** [1] By a notice of application dated 29 July 2020 (encl 9) the plaintiff applied to enter summary judgment under O 14 r 2 of the Rules of Court 2012 ('the ROC') against the defendants ('the plaintiff's O 14 application').
- H** [2] By a notice of application dated 17 August 2020 (encl 12) the plaintiff also applied to strike out the defendants' counterclaim dated 14 July 2020 pursuant to O 18 r 19(1)(a) and/or (b) and/or (d) ROC and/or under the inherent jurisdiction of the court ('the plaintiff's O 18 application').
- I** [3] Both encls 9 and 12 (collectively 'the applications') were heard and decided together. It was appropriate to do so as the defendants' cause of action against the plaintiff in their counterclaim is closely tied to their defence. Thus, if there is not merit in the defendants' defence the plaintiff would succeed in both the applications thereby entitling it to summary judgment while the defendants' counterclaim would fail.

[4] After hearing parties for two days, as they were not able to complete their submissions in one sitting, I had reserved my decision and thereafter allowed both the applications. I set out below the reasons for my decision.

A

SALIENT BACKGROUND FACTS

B

[5] The plaintiff, a banking institution, granted the following banking facilities ('facilities') to the first defendant subject to the terms and conditions contained in the letter of offer dated 19 April 2013 and facility agreement dated 31 May 2013 (collectively 'the agreement'):

C

- (a) the 'Omnibus Trade facilities' consisting letter of credit, trust receipt, bankers' acceptance ('BA'), foreign currency trade loan, shipping guarantee and bank guarantee of RM10m; and
- (b) the 'Forward Foreign Exchange' of RM1m.

D

[6] The facilities are secured by, inter alia, the letter of guarantee dated 31 May 2013 executed by the second defendant (a public listed company) to guarantee payment under the agreement subject to a principal limit of RM11m together with interest.

E

[7] Dato' Sri Liew Yew Chung ('DSL') and Dato' Sri Liew Kuek Hin are the authorised signatories of both defendants at the material time.

[8] The manner in which the BA transactions operate under the facilities are summarised as follows:

F

- (a) funds are paid out by the plaintiff under the facilities upon the application of the first defendant which application must be properly supported by third party trade documents; and
- (b) the plaintiff then pays the third party and debits the first defendant account who then has the agreed number of days by which repayment must be made to the plaintiff ('maturity date').

G

[9] The subject matter of this action involves a series of 21 BA transactions where the earliest BA was issued on 21 December 2018 and the last on 12 April 2019 as follows:

H

No.	Bill Reference	Date of Issue	Maturity Date	Principal (RM)
1.	108BA18122447993	21 December 2018	10 May 2019	134,000
2.	108BA18122447999	21 December 2018	10 May 2019	362,000

I

A	3.	108BA18122648534	26 December 2018	3 May 2019	502,000
	4.	108BA18122849249	28 December 2018	24 May 2019	283,000
B	5.	108BA18122849250	28 December 2018	24 May 2019	133,000
	6.	108BA18122849257	28 December 2018	17 May 2019	125,000
C	7.	108BA19011452351	10 January 2019	7 June 2019	291,000
	8.	108BA19011853715	18 January 2019	3 May 2019	70,000
D	9.	108BA19012955782	25 January 2019	14 June 2019	113,000
	10.	108BA19020457052	29 January 2019	21 June 2019	294,000
E	11.	108BA19021558650	15 February 2019	5 July 2019	265,000
	12.	108BA19022259943	22 February 2019	3 May 2019	56,000
F	13.	108BA19022259989	22 February 2019	17 May 2019	126,000
	14.	108BA19022660717	22 February 2019	19 May 2019	199,000
G	15.	108BA19031163693	8 March 2019	17 May 2019	87,000
	16.	108BA19032968127	29 March 2019	23 August 2019	200,000
H	17.	108BA19032968128	29 March 2019	16 August 2019	177,000
	18.	108BA19040569657	5 April 2019	5 July 2019	226,000
I	19.	108BA19040569660	5 April 2019	30 August 2019	262,000
	20.	108BA19041271219	12 April 2019	9 May 2019	156,000
	21.	108BA19041271231	12 April 2019	3 May 2019	216,000
TOTAL AMOUNT CLAIMED					4,277,000

I [10] Out of the above 21 BA transactions, the defendants have only specifically disputed 3 BA transactions, namely those listed as items 3, 6 and 11 in the above table amounting to a principal amount of RM892,000 ('impugned BA'). There is no specific issue raised by the defendants in respect of the remaining 18 BA transactions amounting to RM3,385,000.

- [11] All three impugned BA transactions were supported by commercial documents namely invoices and delivery orders from a third company known as Secret Ingredients Sdn Bhd ('Secret Ingredients'). A
- [12] The subsequent paragraphs deal with facts pertaining to, inter alia, the background of the defendants. They are material as they form the basis of the defendants' defence and counterclaim. However, so as to ensure a complete context is provided, the timing of the impugned BA transactions have also been inserted according to the proper sequence in the chronology of events leading to the filing of this action and events that took place immediately thereafter. B
C
- [13] The first defendant is a wholly owned subsidiary of the second defendant.
- [14] Both the defendant companies were part of the London Biscuits Bhd Group of Companies ('LBB Group') having common directors and shareholders wherein London Biscuits Bhd ('LBB') was the 'parent company'. D
- [15] The second defendant and the parent company, LBB, are public listed companies and therefore subject to regulation by Bursa Malaysia Bhd ('Bursa'). E
- [16] The plaintiff was a common financier for the companies in the LBB Group. F
- [17] On 5 January 2017, Mr Edward Tan Juan Peng was appointed to the board of directors of the second defendant. F
- [18] On 23 August 2017, the same Mr Edward Tan Juan Peng was appointed to the board of directors of the first defendant. G
- [19] On 21 May 2018, Bursa issued a reprimand against the second defendant and its then directors for non-compliance with Malaysian Financial Reporting Standards for the financial years ending 30 June 2015 and 30 June 2016. It is to be noted that this reprimand was issued prior to any of the BA transactions and is in respect of financial years more than *two years prior* to the issuance of any of the BA transactions. H
- [20] On 21 December 2018, the first batch of the BA transactions listed in the above table was issued by the plaintiff on the application of the first defendant. I
- [21] On 26 December 2018, a BA transaction was issued by the plaintiff on

- A the application of the first defendant which is the *first* impugned BA transactions.
- [22] On 28 December 2018, another batch of the BA transactions as listed in the above table was issued by the plaintiff on the application of the first defendant which includes the *second* impugned BA transactions.
- B
- [23] In early 2019, LBB went into financial distress.
- C [24] On 15 February 2019, a BA transaction as listed in the above table was issued by the plaintiff on the application of the first defendant which is the *third* impugned BA transactions.
- D [25] On 12 April 2019 the last BA transaction was issued by the plaintiff on the application of the first defendant.
- [26] On 3 May 2019 the earliest maturity date fell due and the first defendant defaulted on the repayment of the BA.
- E [27] On 8 May 2019, the second defendant's audited report for financial year ending 31 December 2018 was announced through to Bursa.
- F [28] From 1 July 2019, a series of correspondences between the defendants' solicitors, the plaintiff's solicitors and solicitors for other creditor banks in respect of proposals to settle the defendants indebtedness to the respective creditor banks were exchanged.
- G [29] On 19 August 2019, the plaintiff through its' solicitors, issued the two letters of *recall cum demand*, both dated 19 August 2019 to the first defendant in respect of the first defendant's default in repayment and to the second defendant as guarantor.
- H [30] On 4 September 2019 and 12 September 2019, LBB made Bursa announcements regarding audits and trades between LBB and Secret Ingredients.
- I [31] On 3 October 2019 and 17 October 2019, the second defendant, through their solicitors, corresponded with the plaintiff's solicitors in respect of settlement proposals involving the defendants' white knight company called Wah Kong Corp ('Wah Kong proposals'). The said proposals *included* the subject matter of the plaintiff's claim herein.

- [32] On 19 November 2019, the second defendant through their solicitors wrote to all the second defendant's creditor banks including the plaintiff proposing to record an 'Omnibus Consent Order' in suit commenced by Bank of China (M) Bhd against the defendants. A
- [33] On 5 December 2019, a consent order was entered into between the defendants and Bank of China (M) Bhd. B
- [34] On 10 December 2019, the second defendant through their solicitors corresponded with the plaintiff's solicitors in respect settlement proposals with another white knight company called Mamee Double-Decker (M) Sdn Bhd ('Mamee'). C
- [35] On 13 January 2020, a winding up order was granted against LBB. D
- [36] On 17 February 2020, there was further correspondence between the second defendant through their solicitors and the plaintiff's solicitors in respect of the Mamee proposal for settlement.
- [37] On 18 March 2020, a movement control order announced by the government. E
- [38] On 8 May 2020, the second defendant through its solicitors corresponded with the second defendant's creditor banks including the plaintiff in respect of the Mamee proposal for settlement. F
- [39] On 1 June 2020, this action was filed by the plaintiff against the defendants.
- [40] On 3 June 2020, Mamee *withdrew* from the proposal for settlement. G
- [41] On 9 June 2020, the second defendant through their solicitors corresponded with their creditor banks including the plaintiff to advise on Mamee's withdrawal and raised the issue of unauthorized BA transactions to support a fresh proposal for settlement. H
- [42] On 11 June 2020, the plaintiff through their solicitors rejected the fresh proposal for settlement. I
- [43] On 23 June 2020, the second defendant appointed BDO Governance Advisory Sdn Bhd ('BDO') to carry out investigations into the commercial documents used to support various BA applications to the creditor banks including the plaintiff's 21 BA transactions. The appointment was announced

A through Bursa on 25 June 2020.

[44] On 21 August 2020, BDO issued its' first report ('BDO's first report') of which extracts of documents relating to Secret Ingredients were exhibited.

B [45] On 11 September 2020, BDO issued a revised version of the BDO's first report ('BDO's revised first report') of which extracts of documents relating to Secret Ingredients were exhibited.

C [46] On 28 September 2020, the defendants filed Suit No WA-22NCC-468-09 of 2020 against DSL who is alleged to be responsible for the impugned BA transactions.

D [47] On 5 October 2020, a news article was published in *The Edge* entitled 'Initial findings of fictitious transactions at Khee San indicate worse to come' arising from the Bursa announcements.

E [48] On 16 October 2020, BDO issued a second report ('BDO's second report') to show the movement of funds.

[49] On 21 October 2020, a police report was lodged by the defendants.

THE PLAINTIFF'S CLAIM

F [50] The plaintiff's claim against the defendants arises from the default in payment by the first defendant and the second defendant as the first defendant's guarantor.

G [51] The reliefs the plaintiff is seeking are essentially as follows:

- (a) judgment sum of RM4,701,013.30 as at 18 May 2020 under the Omnibus Trade (Bankers Acceptance) Facility;
- (b) continuing interest on the overdue principal sum of RM4,277,000 at the rate of 4%pa above the plaintiff's Base Lending Rate ('BLR') (presently the plaintiff's BLR is 5.67%pa as at 18 May 2020 subject to fluctuations at the plaintiff's absolute discretion) and penalty interest at the rate of 1%pa calculated on daily rest from 19 May 2020 until the date of full settlement;
- (c) reimbursement of the plaintiff's legal cost of RM7,497.70; and
- (d) costs.

THE DEFENDANTS' DEFENCE AND COUNTERCLAIM

A

[52] The defendants filed a joint statement of defence and counterclaim dated 14 July 2020 and subsequently filed an amended statement of defence and counterclaim dated 2 November 2020 ('encl 31').

B

[53] In encl 31, the defendants pleaded in their defence that:

- (a) the defendants have a previous board of directors and a current board of directors;
- (b) the plaintiff was negligent in allowing the drawdown of RM892,000 based on forged and/or fictitious supporting documents that were submitted for three BA transactions as follows:

C

No	Date	Banker's Acceptance No	Bank Advice	Due Date	Finance Amount (RM)
1.	26 December 2018	BA352084	108BA181226 48534	3 May 2019	502,000
2.	28 December 2018	BA352087	108BA181228 49257	17 May 2019	125,000
3.	15 February 2019	BA352096	108BA190215 58650	5 July 2019	265,000
TOTAL					892,000

D

E

- (c) the defendants plead that drawdown documents for the three impugned BA transactions were the fabricated and/or fictitious;
- (d) the defendants contend that there were no genuine transactions underlying the invoices and delivery orders being the drawdown documents for the three impugned BA transactions;
- (e) the defendants allege that the plaintiff:

F

G

- (i) was wilfully *ignorant and/or negligent* in effecting the drawdowns,
- (ii) by virtue of the banker-customer relationship between the plaintiff and the first defendant, the plaintiff owed the first defendant the following duties both in *contract* and in *tort*:

H

(A) the plaintiff should *refrain* from allowing drawdown of BA Facility if the plaintiff was *put on inquiry* in the sense that the plaintiff had reasonable grounds for believing that a particular BA facility was an attempt to misappropriate funds of the first defendant; and

I

(B) a *duty of care* to make *reasonable inquiries* to satisfy itself that a transaction was bona fide before allowing the first defendant's application to drawdown the BA Facility if the

- A** plaintiff through its agent(s) was aware or ought to be aware of circumstances surrounding the transaction which would suggest that the transaction was part of a breach of trust and/or breach of fiduciary duty and/or fraudulent scheme;
- B** (iii) owes an implied duty of good faith to the first defendant and by extension to the second defendant as corporate guarantor;
- (iv) on the basis of the BDO investigation the defendants plead that the plaintiff has failed miserably to validate the documents and to verify the documents with the relevant third parties concerned; and
- C** (v) the defendants assert that at least RM892,000 principal sum out of the RM4,277,0000 claimed by the plaintiff is not due and owing.

- D** [54] The defendants' counterclaim against the plaintiff is essentially for:
- (a) damages for negligence;
- (b) an account of all monies drawn down by virtue of fictitious invoices presented to the plaintiff;
- E** (c) an account of all monies paid by the first defendant to the plaintiff by virtue of maturity of those fictitious invoices;
- (d) an account to be taken of what is due by the first defendant to the plaintiff or vice versa;
- F** (e) all further proper accounts, inquiries and directions;
- (f) an order for payment of any sum due by the second (?) plaintiff to the defendant or vice versa.

G LEGAL PRINCIPLES IN RESPECT OF THE PLAINTIFF'S O 14 AND O 18 APPLICATIONS

- H** [55] The law pertaining the applications are both trite and clear. Therefore, I will only briefly restate the relevant provisions and the applicable principles for completeness.

- I** [56] Amongst the main provisions that the court needs to consider in a summary judgment application under O 14 of the ROC are O 14 r 1(1), O 14 r 3(1) and O 14 r 4(1) ROC provides:

Order 14 Rule 1(1)

Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has *entered an appearance* in the action, the plaintiff may, *on the ground that the defendant has no defence to a claim* included in the writ, or to a particular part of such a claim, or has no defence to such a claim or

- part thereof except as to the amount of any damages claimed, apply to the Court for judgment against that defendant. A
- Order 14 Rule 3(1)
- Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is *an issue or question in dispute which ought to be tried* or that there *ought for some other reason to be a trial* of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed. B
- Order 14 Rule 4(1) C
- A defendant may show cause against an application under rule 1 *by affidavit or otherwise* to the satisfaction of the Court. (Emphasis added.)
- [57] Once the 3 preliminary requirements have been fulfilled in that the defendant must have entered an appearance, the statement of claim served on the defendant and the affidavit in support of the application complies with the requirements of O 14 r 2 of the ROC then the plaintiff in a summary judgment application will have established a *prima facie* case entitling him to judgment. The burden then shifts to the defendant to satisfy the court why judgment should not be given against him (*National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300; [1984] 1 CLJ Rep 283). D
- [58] With regards to O 14 r 4(1) of the ROC, it is generally accepted that the word ‘otherwise’ means the defendant may show cause against the summary judgment application through an affidavit or his statement of defence (*Gissco Sdn Bhd v Blackgold (M) Sdn Bhd* [1988] 2 MLJ 397 (HC); *Alliance (Malaya) Engineering Co Sdn Bhd v San Development Sdn Bhd* [1974] 2 MLJ 94 (FC)). However, this does *not* mean the rules pertaining to pleadings do not apply. If the defendant raises an issue in his affidavit but the issue was not pleaded in his statement of defence, he will be *precluded* from raising that issue (*United Malayan Banking Corporation Bhd v Datin Theresah bte Abdullah & Anor* [1994] MLJU 273; [1994] 2 MLRH 366; and *Pembinaan V-Jaya Sdn Bhd v Binawisma Development Sdn Bhd* [1987] 1 MLRH 287; [1987] CLJ Rep 823). E
- [59] In respect of the plaintiff’s O 18 application, O 18 r 19(1)(a)–(d) of the ROC provides as follows: F
- (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that — G
- (a) it discloses *no* reasonable cause of action or *defence*, as the case may be; H
- (b) it is *scandalous, frivolous or vexatious*; I

- A (c) it may prejudice, embarrass or delay the fair trial of the action; or
(d) it is otherwise an *abuse of the process of the Court*,
and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be. (Emphasis added.)
- B [60] The plaintiff's O 18 application is made pursuant to O 18 r 19(1)(a) and/or (b) and/or (d) of the ROC.
- C [61] A pleading or a claim would only be struck out if on the face of it is obviously unsustainable (*Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1; *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36).
- D [62] The word 'scandalous' in O 18 r 19(1)(b) of the ROC has been defined to mean 'wholly unnecessary and irrelevant' (*Boey Oi Leng (t/a Indah Reka Construction & Trading) v Trans Resources Corporation Sdn Bhd* [2001] MLJU 566; [2002] 1 CLJ 405; [2001] 4 AMR 4807; *Technointan Holding Sdn Bhd v Tetuan Tan Kim Siong & TBH Hong Jet* [2007] 1 MLJ 163; [2006] 7 CLJ 541).
- E [63] While the words 'frivolous or vexatious' have been defined to mean obviously unsustainable within the four corners of O 18 r 19(1)(b) of the ROC (*Technointan Holding*). The words generally refer to a groundless action or statement with no prospect of success, often raised to embarrass or annoy the other party to the action (*Middy Industries Sdn Bhd & Ors v Arensi-Marley (M) Sdn Bhd* [2013] 3 MLJ 511; [2012] 1 LNS 830).
- F [64] Bearing the above principles, I will now examine them in relation to the facts of the case and arguments presented by both parties.
- G THE DEFENDANTS' SUBMISSIONS ON THE APPLICATIONS AND THEIR MAIN ISSUE OF CONTENTION
- H [65] Lengthy submissions were advanced on behalf of the defendants, both written and oral. However, they actually all turn on one main issue which will determine both the applications.
- I [66] As I have stated at the beginning of this judgment, both the applications are so connected with each other the outcome of one would inevitably affect the other. Even the written submissions filed by both parties cover both the applications.

[67] How the courts have approached lengthy hearings and submissions such as these in particular in relation to a summary judgment application and a striking out application can be seen in the following two cases:

- (a) in the case of *Woolley Development Sdn Bhd v Mikien Sdn Bhd* [2008] 1 MLJ 585; [2008] 2 CLJ 303 which was a case pertaining to an O 81 of the ROC application which procedure is substantially the same as an O 14 of the ROC application, the Court of Appeal held:

[46] The plaintiff in a summary judgment application first needs to establish a prima facie case that 'he is entitled to judgment'. The burden then shifts to the defendant to satisfy the court why judgment should not be given against him (see *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300; [1984] 2 CLJ 220; [1984] 1 CLJ Rep 283 per Seah FJ). 'Ought' in O 81 r 3, is an expression of a strong probability. In other words, *the issue in dispute must be critically investigated and be determined as genuine*. This is what a defendant needs to prove to be entitled to a trial of that disputed issue. (Emphasis added.)

- (b) meanwhile in the context of an O 18 r 19 application, the Court of Appeal in *Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661; [1996] 1 CLJ 393, again adopted a similar approach as follows:

'The words 'plain and obvious' also need clarification. This case involved complex questions of company law. What may be 'plain and obvious' to a specialist in this field may not be so to another who does not have this specialised knowledge. I therefore feel obliged to state that the standard here is an objective one and implies that the perception required here is that of a person who has the required expertise. Support for this view can be found in *McKay v. Essex Area Health Authority* [1982] QB 1116 where it was held that *the right course was for the Court to strike out a claim, even though it required a long and elaborate hearing before the Court was satisfied that there was no cause of action, because the plaintiff was entitled to be relieved of the objection to meet it*. (Emphasis added.)

[68] Therefore, without oversimplifying the principles laid down in both *Woolley* and *Tuan Haji Ishak* and applying them in tandem to the present case, the rule is that regardless of the lengthy submissions and the protracted hearing, at the end of the day the court is to determine what the *real* issue or issues are and decide on whether they are triable or have merits.

[69] Thus, what is the real issue of contention in the present case? It is essentially this: whether the plaintiff owes the defendants a duty called the *Quincecare* duty of care or *Quincecare* duty.

[70] This, with respect, is the *main issue* which is the basis of the defendants' defence and their cause of action against the plaintiff in their counterclaim.

A [71] I will specifically deal with the *Quincecare* duty later in this judgment and have dedicated entire sections seeing that it is the heart of the defendants' defence and counterclaim.

THE QUINCECARE DUTY

B [72] What then is the *Quincecare* duty?

C [73] It is derived from the English case of *Barclays Bank plc v Quincecare Ltd and another* [1992] 4 All ER 363 and the said duty of care is held as follows:

D In my judgment the sensible compromise, which strikes a fair balance between competing considerations, is simply to say that a *banker must refrain from executing an order if and for as long as the banker is 'put on inquiry' in the sense that he has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate the funds of the company* (see proposition (3) in *Lipkin Gorman v Karpnale Ltd* (1986) [1992] 4 All ER 331 at 349; [1987] 1 WLR 987 at 1006). (Emphasis added.)

E [74] Based on *Quincecare*, there are certain *qualifications* to the *Quincecare* duty and they are as follows:

- (a) the *Quincecare* duty can be an implied term in a contract and can also exist in tort:

F In my judgment it is an *implied term of the contract* between the bank and the customer that the bank will observe reasonable skill and care in and about executing the customer's orders. Moreover, notwithstanding what was said in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1985] 2 All ER 947 at 957; [1986] AC 80 at 107, *a banker may in a case such as the present be sued in tort as well as in contract*: see *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp (a firm)* [1978] 3 All ER 571; [1979] Ch 384. But the duties in contract and tort are coextensive, and in the context of the present case nothing turns on the question whether the case is approached as one in contract or tort. (Emphasis added.)

- H** (b) the *Quincecare* duty is in the context of a bank carrying out instructions by its customer in respect of the customer's current account and the bank is regarded as the agent which owed a fiduciary duty to the customer:

I Primarily, the relationship between a *banker and customer* is that of *debtor and creditor*. But *quoad the drawing and payment of the customer's cheques as against the money of the customer's in the banker's hands the relationship is that of principal and agent*: see *Westminster Bank Ltd v Hilton* (1926) 43 TLR 124 at 126 . per Lord Atkinson. Similarly, when the bank in the present case acted on an order J to transfer by immediate money transfer money from the *Quincecare* current account to Philip Evans & Co in Bournemouth, the bank was acting as *Quincecare's agent*. *As agent the bank owed fiduciary duties to*

Quincecare: see Bowstead on Agency (15th edn) pp 156–160. (Emphasis added.)

A

[75] The above qualifications are important as will be seen later in this judgment when dealing on whether the *Quincecare* duty applies.

B

[76] The *Quincecare* duty received a lot of traction in recent years in England when it was applied and affirmed by the English Court of Appeal and Supreme Court in the case of *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50 (SC) and the High Court case of *Federal Republic of Nigeria v JP Morgan Chase Bank, NA* [2019] EWHC 347 (Comm).

C

[77] A bank is mandated to carry out the instructions of its customers, however, the *Quincecare* duty imposes an obligation on the bank to refrain from executing an order for payment if and for as long as he is put on inquiry of an attempt to misappropriate funds.

D

[78] *Quincecare* was a case where the company's (*Quincecare*) own director had committed fraud on the company by causing funds lent by the bank to the company to be misappropriated. When the company as the borrower defaulted in repayment of the loan, the bank sued the company and its guarantor. They in turned counterclaimed against the bank for breaching its duty of care. Interestingly, the company and guarantor did not succeed in their counterclaim against the bank but the bank's claim against them were allowed. Nevertheless, the learned English High Court judge, Justice Steyn, held that the bank owed a duty of care to its customer as stated above in the above passages I had quoted from the *Quincecare* reported decision.

E

F

[79] The difficulty in the application of the *Quincecare* duty is that it imposes a form of 'constructive notice' on the bank which goes beyond what the bank actually knows but what the bank *ought* to know.

G

[80] This is despite the risks that the bank would still be exposed to liability if it refrained from executing the instructions of its customer believing that there was something amiss which could later turn out to be legitimate.

H

WHETHER THE QUINCECARE DUTY APPLIES IN THIS CASE

[81] I have the opportunity to deal with the applicability of the *Quincecare* duty in the case of *Lee Cheong Chee v HSBC Bank Malaysia Bhd* [2021] MLJU 574. However, the facts of that case were different though the arguments were similar to the case herein.

I

[82] The immediate question arising from this issue is whether the

A *Quincecare* duty, being an English principle, has been applied in our Malaysian courts.

[83] Learned counsel for the defendants, Mr Owee Chia Ming, had cited several local cases, however, the following two were some of his main ones:

- B
- (a) *Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2006] 5 MLJ 1 (FC); and
 - (b) *Public Bank Bhd & Anor v Exporaya Sdn Bhd* [2013] 1 MLJ 507 (CA).

C [84] *Abdul Rahim* involved the bank's release of banking facility via one drawdown when it was agreed there would be two drawdowns based on the working draft of the facility agreement. The bank had varied that term without informing the borrower who believed the terms of the finalised facility agreement were the same as the working draft as they were not informed of further changes. The Federal Court allowed the borrower's, being the fifth appellant in that case, claim against the bank. The relevant part of the Federal Court's decision are as follows:

E [25] We also find it intriguing why, after having negotiated with the fifth appellant over a considerable period of time and finally agreeing to a working draft, that the respondent would do a complete volte-face, without informing the fifth appellant. Was it done in the pious hope that the fifth appellant may not stumble upon it in the agreement? In this instance, the fifth appellant did just that. *If this is the case, then it is conduct that we do not propose to countenance from a financial institution.*

F ...

G [28] To our minds, *if a bank executes an order knowing it to be dishonestly given, or shuts its eyes to an obvious fact of dishonesty, or acted recklessly in failing to disclose material facts, the bank will plainly be liable. In our judgment, it is an implied term of the contract between the bank and the customer that the bank will observe reasonable skill and care in and about executing customer's orders* (see *Barclays Bank plc v Quincecare Ltd and another* [1992] 4 All ER 363). (Emphasis added.)

H [85] It appears that the *Quincecare* case was only referred in the paragraph (para 25) referred to above and it adopted the judgment of Justice Steyn in *Quincecare*.

[86] It is observed that in *Abdul Rahim* the bank had clearly gone against what parties had agreed when it varied the term of the facility agreement without the consent of the borrower.

I [87] On the other hand, in the case of *Exporaya* the bank used the *Quincecare* duty in its aid. Here the bank stopped and froze the account of the customer, a company, after it received instruction to change the signatories of said customer's account. This was because the bank subsequently received a

complaint from two directors of the company who informed the bank that the previous mandate should remain.

[88] The Court of Appeal in *Exporaya* applied the *Quincecare* duty and in doing so followed the English case of *Lipkin Gorman (a firm) v Karpnale Ltd and another* [1992] 4 All ER 409 where it was held:

[24] The contractual duties of a bank towards a customer was established by the English Court of Appeal in the case of *Lipkin Gorman (a firm) v Karpnale Ltd and another* [1992] 4 All ER 331 where Allott J held the following propositions:

(1) The bank is entitled to treat the customer's mandate at its face value save in extreme cases. (2) *The bank is not obliged to question any transaction which is in accordance with the mandate; unless a reasonable banker would have grounds for believing that the authorised signatories are misusing their authority for the purpose of defrauding their principal or otherwise defeating his true intention.* (3) It follows that if a bank does not have reasonable grounds for believing that there is fraud, it must pay. (4) Mere suspicion or unease do not constitute reasonable grounds and are not enough to justify a bank in failing to act in accordance with a mandate. (5) A bank is not required to act as an amateur detective.'

...

[32] *The correct test, in our opinion, must be whether a reasonably prudent banker, faced with the same circumstances, would regard the course of action taken on the facts justifiable.* In each fact situation, common sense must prevail. In every case, we must determine the bank's obligations against the background of day to day commercial activity. We are in full agreement with the above authorities in that faced with what appears to be a genuine mandate presented by agent acting within his authority, when the respondent applied to change the mandate or signatories in respect of the account in question. *The bank's duty of care does not require it to do anything other than to honour the mandate in the absence of circumstances which put the bank on enquiry.* The same principle was adopted by the Singapore Court of Appeal in the case of *Yogambikai Nagarajah v Indian Overseas Bank* (Emphasis added.)

[89] In contrast, learned counsel for the plaintiff, Mr Benjamin Dawson, brought to my attention the Federal Court case of *Chang Yun Tai & Ors v HSBC Bank (M) Bhd and other appeals* [2014] 1 MLJcon 134. The appellants in this case had sued, inter alia, financial institutions. The appellants there claimed that the developer and its connected companies had conspired to defraud the appellants by way of a scheme aimed at inducing the appellants into purchasing apartments in a particular project. The appellants' contended that the sale and purchase agreements ('SPAs') they entered into were void ab initio for being illegal and contrary to public policy and that it followed that the financing agreements, which the appellants had executed with the respondents, were also void and of no legal effect. The High Court struck out the appellants' claim against the respondent financial institutions and this decision was upheld by the Court of Appeal. In their appeal at the Federal Court the appellants argued that the respondents were under a duty to enquire into the legality of

- A the SPAs and that having omitted to observe this duty they could not rely on their default to insist that the appellants repay their loans. That the illegality of the SPAs discharged the appellants from their obligations to the respondents. The main question of law for which the Federal Court's decision was sought that is relevant to the present case is as follows:
- B Whether the respondents are *under a duty to enquire and/or ensure* that the SPA are free from *illegalities* as a pre-condition to the end financing being granted. (Emphasis added.)
- C [90] The Federal Court in *Chang Yun Tai* answered the above question, inter alia, as follows:
- [12] We shall first deal with the third question framed in this appeal as this deals with the duty of any of the respondents to enquire. The appellants take the view that there is a duty on the part of the respondent to enquire into the legality of the SPA.
- D *It is our considered view this is not a tenable proposition* for the following reasons:
- [13] The *respondent is not a party to the SPA*. The SPA is the respective appellant's contract with the developer. Therefore, *the duty is cast on the appellants rather than the respondent to ensure that the SPA is free from any legal infirmity*. If they have omitted to do so, we are of the view they cannot rely on their default to defeat the respondent's claim to repay their loans. On this point we would cite the case of *Golden Vale Gold Range & Country Club Sdn Bhd v Hong Huat Enterprise Sdn Bhd (Airport Auto Centre Sdn Bhd & Anor, third party and another appeal)* [2008] 4 MLJ 839 wherein Gopal Sri Ram JCA (as he then was) at p 847 had this to say:
- F If this clause is to be given effect to, *it would mean that Airport Auto could rely on its own failure to complete the sale and thereby defeat the defendant's claim for specific relief*. It would mean that Airport Auto could rely on its own wrong to its advantage. Settled authority has held that a party cannot rely on its own wrong to defeat its opponent's claim.
- G [14] It is also our considered view that *the respondent has no duty to advise the appellants as borrowers in the present case because it is merely a financing bank and not an advisory bank*. Generally speaking, in a commercial loan a lender is entitled to seek and obtain the best terms it can. It may have regard solely to its own commercial interest. *It is not the lender's obligation to ensure that the borrower has made a correct or wise commercial decision based upon a full understanding of all risks unless the borrower has specifically sought the lender's advice* (see the case of *Redmand v Allied Irish Bank plc* [1987] FLR 307).
- H
- I [15] It is to be noted the SPA has already been executed before the end financing facilities were granted. Therefore the respondent can presume that the SPA which the appellants had entered into has been ascertained by the appellants to be valid. It would be too onerous to require the respondent to investigate or enquire into a transaction or contract to which they are not a party. Banking business will be rendered impracticable and burdensome if this was so. In this regard the courts should not impose such a requirement that may impede the flow of commerce. On this point Edgar Joseph Jr FCJ in *Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313; [1995] 4 CLJ 300 in delivering the

- judgment of this court cautioned at p 328 (MLJ); p 313 (CLJ) as follows: A
- ... *a commercial Judge must be anxious about the impact that a decision may have on the proper functioning of the commercial community.*
- ...
- [21] *The relationship between the respondent as the lending bank and the appellants as the borrowers is a contractual one and is purely a commercial in nature.* It is one of debtor and creditor. The respondent did no more than to lend the monies as requested. In return, the appellants promised to repay the monies lent. *The alleged illegality of the SPA does not in any way discharge the appellants' obligation. It would be odd and indeed unjust if the appellants can be permitted to transfer the loss under their investment due to the alleged illegality to their financiers.* The alleged illegality of the SPA is irrelevant to the appellants' obligation under the financing agreement or to use the words of O'Driscoll J in Canadian Imperial Bank of Commerce's case is 'a red herring hidden in thick fog'. (Emphasis added.) B
- [91] It is clear that the *Chang Yun Tai* case negates the application of the *Quincecare* duty. That the *Quincecare* duty cannot be imposed on a bank as the bank has no duty to inquire into transactions between its customer and third parties which the bank is not privy to. C
- [92] It would seem that there is a conflict between the principles enunciated in *Chang Yun Tai* and the principles enunciated in *Abdul Rahim* and *Exporaya*. D
- [93] I also note that *Quincecare*, *Abdul Rahim* and *Exporaya* were *not* referred to in *Chang Yun Tai*, being the latter of case. E
- [94] Learned counsel for the plaintiff further referred to the Privy Council case of *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 which held as follows: F
- Their Lordships do not believe that *there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship.* This is particularly so in a *commercial relationship.* Though it is possible as a matter of legal semantics to conduct an analysis of the rights and duties inherent in some contractual relationships including that of *banker and customer* either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will be to identify a duty arising from the proximity and character of the relationship between the parties, their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other, and for the avoidance of confusion because different consequences do follow according to whether liability arises from contract or tort, e.g. in the limitation of action ... G
- ... H
- ... I

- A Their Lordships do not, therefore, embark on an investigation as to whether in the relationship of banker and customer it is possible to identify tort as well as contract as a source of the obligations owed by the one to the other. *Their Lordships do not, however, accept that the parties' mutual obligations in tort can be any greater than those to be found expressly or by necessary implication in their contract ...* (Emphasis added.)
- B [95] *Tai Hing Cotton Mill* was referred in *Quincecare* but the above principle was not applied.
- C [96] At this juncture I would pause to highlight that *Chang Yun Tai* was decided on an O 18 r 19 of the ROC application. Similarly, the Court of Appeal in *Zulpadli bin Mohammad & Ors v Bank Pertanian Malaysia Bhd* [2013] 2 MLJ 915 also struck out a suit based on the principles of *Chang Yun Tai*. In *Zulpadli* the bank sued the lawyer who prepared the financing documents when it was subsequently discovered that the title to the property was invalid. The Court of Appeal struck out the bank's claim because the financing documents and sale and purchase agreement ('SPA') were separate contracts. The Court of Appeal held that the lawyer has no duty to inquire into the property title under the SPA because he was not party to the SPA.
- D
- E [97] The Court of Appeal in *Zulpadli* in fact applied *Chang Yun Tai* against the bank applying the same principle in aid of the bank's lawyer.
- F [98] Having examined the cases which applied the *Quincecare* duty and the cases such as *Chang Yun Tai*, I am of the considered view that the *Quincecare* duty does not apply to this case. The following paragraphs contain my reasons:
- G (a) the principles laid out by the Federal Court in *Chang Yun Tai* is very clear and it negates the imposition of a duty of care such as the *Quincecare* duty on the plaintiff bank. The facts of *Chang Yun Tai* are similar to the present case and the issue of law determined there are directly on point, hence it is applicable here;
- H (b) for all intends and purposes, the *Quincecare* duty is a duty founded upon the law of tort or is otherwise said to be tortious duty of care. It is not contractual. What was done in *Quincecare* is that the English High Court *implied* the *Quincecare* duty in the contract between the bank and its customer;
- I (c) however, in *Quincecare* the English High Court still recognised that the contractual duty of the bank is paramount where it was held:
- Given that the bank owes a legal duty to exercise reasonable care in and about executing a customer's order to transfer money, *it is nevertheless a duty which must generally speaking be subordinate to the bank's other conflicting contractual duties.* (Emphasis added.)

- (d) in *Abdul Rahim*, the breach there can be regarded as a breach of contract when the bank failed to include or rather varied the terms of the facility agreement against what parties had agreed; A
- (e) in *Abdul Rahim* it was further held as follows: B
- A bank is *not obliged* to question any transaction which is in accordance with the customer's mandate, unless there are grounds for believing that these was a misuse of authority for the purpose of committing a fraud. See *Lipkin Gorman (a firm) v Karpnale Ltd and another* [1992] 4 All ER 331. (Emphasis added.)
- (f) this arguably means that such a duty is imposed on the *actual knowledge* of the bank and not 'constructive' knowledge. In any event the facts of the *Abdul Rahim* case are vastly different and the case does not involve the *Quincecare* duty in terms of the bank being put on inquiry; C
- (g) further, applying this to *Exporaya*, the bank there having received conflicting instructions had acted *on its own* to freeze the customer's account. It needed to do so to decide which instruction to follow. *Exporaya* is also distinguishable on the facts; D
- (h) another reason the *Quincecare* duty does not apply here is because of its *qualifications*. This is especially important given that the defendants are relying on and are attempting to impose on the plaintiff the *Quincecare* duty; E
- (i) as I had stated earlier in this judgment there are qualifications for the applicability of the *Quincecare* duty placed by *Quincecare* itself. The *Quincecare* duty does *not* apply in *all* situations where there is banker-customer relationship. Justice Steyn made this clear when he *limited* the application of the *Quincecare* duty to apply *only* to a bank acting on the instructions of its customer in respect of the customer's current account with the bank or in other words, the *customer's own bank account*, and where it pertains to money *moving out* of that account; F
G
- (j) this would also explain the reason *Singularis* and *JP Morgan* which applied *Quincecare* also concern the account of the *customers* held at the banks in those cases. To my mind, this is not a mere coincidence. It is actually an extremely important distinction because it *limits* the imposition of the *Quincecare* duty on *other* situations. The following passages in *Quincecare* makes this clear: H
- While I have found this approach instructive, the importance of the matter warrants an independent examination of the bank's duties. *My observations are restricted to the relationship of banker and customer in the context of a bank transferring money from a current account on the customer's instructions*. But I cannot overlook the fact that on Friday, 6 January 1984 Mr Stiller could have achieved his dishonest purposes by a different means, viz a cheque on the h I

- A Quincecare account in favour of Philip Evans & Co.
- B Primarily, *the relationship between a banker and customer is that of debtor and creditor. But quoad the drawing and payment of the customer's cheques as against the money of the customer's in the banker's hands the relationship is that of principal and agent*: see *Westminster Bank Ltd v Hilton* (1926) 43 TLR 124 at 126, per Lord Atkinson. Similarly, when the bank in the present case acted on an order J to transfer by immediate money transfer *money from the Quincecare current account* to Philip Evans & Co in Bournemouth, *the bank was acting as Quincecare's agent*. As agent the bank *owed fiduciary duties* to Quincecare: see Bowstead on Agency (15th edn) pp 156-160. (Emphasis added.)
- C (k) the words, 'money of the customer's in the banker's hands' in particular are very clear. What can be concluded from the above passages is that the *Quincecare* duty only applies to instructions by the customer involving the customer's *own* account with the bank. This is because the bank in such a situation is the customer's agent and owed fiduciary duties to its customer;
- D (l) the bank, under that circumstance, is considered the 'custodian' of the customer's money held at the bank. The customer naturally stands to lose more than the bank. As a 'custodian' and agent of the customer, the bank, based on *Quincecare*, needed to be *extra careful* so to speak;
- E (m) this is as compared to monies which are *borrowed* from the bank such as in the instant case. The BA transactions involve the plaintiff bank's own funds and *not* the first defendant's (or second defendant) and the plaintiff stands to lose more than the defendants. Here the plaintiff bears the greater risk;
- F (n) another reason why the *Quincecare* duty cannot apply in the present case is due to the fact that its application is *further limited to rare and exceptional* cases requiring a *high threshold*. This was clearly stated by the English Court of Appeal and Supreme Court in *Singularis* where it was held as follows:
- G English Court of Appeal
- H [98] There are certain general conclusions that can, I think, properly be drawn from this case, put into a rather broader context. First, we were told by Mr Miles that this is the first case where the court has found against a bank in respect of the *Quincecare* duty. That is because it will be a *rare situation* for a bank to be put on inquiry; there is a *high threshold*. But here the judge found, as I have already said, that —
- I any reasonable banker would have realised that there were many obvious, even glaring, signs that Mr Al Sanea was perpetrating a fraud on the company when he instructed that the money be paid to other parts of his business operations.

This case is, therefore, an *unusual one*, the circumstances of which are *unlikely*

often to arise. Secondly, Daiwa has sought to rely at every level of its argument on the existence of a prior fraud as a reason why it ought to have a successful defence. But this ignores the fact, mentioned several times already, that the prior fraud is itself an essential ingredient of the claim for breach of the *Quincecare* duty. Thirdly, Daiwa has sought to suggest that its liability is inappropriate because it is more onerous than that imposed on an auditor. But, as the judge held, and I have reiterated in this judgment, there is no proper comparison between the duties of auditors and bankers. A banker's duties in respect of properly authorised instructions to make payments are strictly limited. As the passages I have cited above from *Quincecare* and *Lipkin Gorman* show, the banker's duty only arises where, *abnormally*, the banker is put on inquiry *by the particular circumstances*. As Steyn J said in *Quincecare*: trust, not distrust, is the basis of a bank's dealings with its customers; and full weight must be given to this consideration before one can conclude that the banker had reasonable grounds for thinking that the order was part of a fraudulent scheme to defraud the company. He continued by saying that the law should guard against the facilitation of fraud, and exact a reasonable standard of care in order to combat fraud and to protect bank customers and innocent third parties. I respectfully agree.

English Supreme Court

It would not enhance the integrity of the law to undermine that balance by denying the claim on grounds of illegality in a case where, *ex hypothesi*, the *exceptional circumstances* needed for the duty to arise and be breached are found to be present. (Paragraph [218].) (Emphasis added.)

[99] Notwithstanding that the *Quincecare* duty does not apply in the present case for reasons stated above, I further make the following observations on this issue of the applicability of the *Quincecare* duty:

[100] The agreement in respect of the facilities granted do not contain the *Quincecare* duty in that the bank is required to refrain from executing an order or instruction for payment if and for so long as it is put on inquiry. Therefore, for the *Quincecare* duty to apply it needs to be implied in the agreement or contract. However, a tortious duty cannot supersede or be greater than parties' obligations in contract (*Tai Hing Cotton Mill*). This is recognised in *Quincecare* but the English High Court, nevertheless, went ahead to imply the duty in the contract. The reason being is that the bank was put on notice of the fraud or impropriety. In this regard *Quincecare* recognised two scenarios:

- (a) the first is where the 'bank executes the order knowing it to be dishonestly given, shutting its eyes to the *obvious* fact of the dishonesty, or acting recklessly in failing to make such inquiries as an honest and reasonable man would make', here the liability of the bank is said to be clear; and

A (b) the second is based on the question on what constitutes a ‘lesser state of knowledge on the part of the bank will oblige the bank to make inquiries as to the legitimacy of the order’.

B [101] I am of the respectful and considered view that the second scenario does not apply in light of cases such as *Chang Yun Tai* and *Aseambankers Malaysia Bhd & Ors v Shencourt Sdn Bhd & Anor* [2014] 4 MLJ 619. However, the first scenario *may* apply in exceptional circumstances. I would not consider it a tortious breach but rather more of a contractual breach. For example, where the commercial document on the face of it is wrong, eg a cheque for payment without a signature or clearly contains a signature of someone other than the authorised signatory, or in the case of *Exporaya* where the bank received conflicting instructions. In these exceptional circumstances then it could be said the bank needs to be proactive to prevent the misappropriation of the customer’s funds but beyond that, to impose such a duty is simply too onerous and would render banking business impracticable. That, to my mind, is undesirable and would negatively impact banking business.

C THE PLAINTIFF IS UNDER NO DUTY TO INVESTIGATE OR
E INQUIRE INTO THE AUTHENTICITY OF COMMERCIAL DOCUMENTS

F [102] Having decided that the *Quincecare* duty does not apply in this case, it is my respectful view that the correct principles that should be applied are based on *Chang Yun Tai* in that the bank does not have a duty to inquire into commercial documents. There, the document was a sale and purchase agreement which the bank was not a party. The bank was entitled to presume the validity of said agreement.

G [103] A bank is not required to act as an *amateur detective* nor obliged to question any transaction which is in accordance with the mandate given unless there are grounds for believing that the authorised signatories are misusing their authority for the purpose of defrauding their principal (*Lipkin Gorman*).

H [104] *Lipkin Gorman* was followed in *Maybank Islamic Berhad v Aldwich Enviro-Management Sdn Bhd* [2015] MLJU 1977; [2015] 1 LNS 1300 involving drawdown of Islamic Accepted Bills where it was held:

I [65] It is reasonable for the plaintiff, being aware that the Employees are the authorised signatories of the companies, to rely on the Employees’ authorisation of the IAB applications’ authenticity as the IAB applications, prima facie seems to be in check. It has already been decided in the case of *Lipkin Gorman (a firm) v Karpnale Ltd and another* [1992] 4 All ER 331 that a bank is entitled to treat the customer’s mandate at its face value save in extreme cases. (Emphasis added.)

[105] The duty of a bank in checking commercial documents are only to the extent of what appears on the face of the document (*Gian Singh & Co Ltd v Banque de l'Indochine* [1974] 2 All ER 754 (Privy Council); *Malayan Banking Bhd v Punjab National Bank* [2018] MLJU 1716).

A

[106] The bank does not take into account matters or circumstances that are *extraneous* to the commercial documents (*Abani Trading Pte Ltd v BNP Paribas and another appeal* [2014] SGHC 111).

B

THE IMPUGNED BA TRANSACTIONS

C

[107] Apart from the issue of the *Quincecare* duty, most of the issues raised by the defendants are based on the impugned BA transactions.

[108] The arguments on these issues which were advanced on behalf of the defendants can be summarised as follows:

D

- (a) regarding the impugned BAs themselves; and
- (b) that the plaintiff was put on notice of the impugned BA.

E

[109] Given that I have decided that the *Quincecare* duty does not apply and that the plaintiff is under no duty to inquire into commercial documents in particular relating to the impugned BA transactions as well as documents pertaining to the other BA Transactions, the above are non-issues.

F

[110] A substantial part of the submissions advanced on behalf of the defendants centred upon numerous alleged instances where the bank was said to have been put on notice of the impugned BA. These arguments were intended to convince the court that the 'put on notice' element of the *Quincecare* duty was present thereby giving rise to the duty itself.

G

[111] These arguments are not relevant as the *Quincecare* duty does not apply in the first place. Therefore, whether the plaintiff was put on notice or not is irrelevant.

H

[112] Learned counsel for the plaintiff has arduously and meticulously responded to each and every argument raised by learned counsel for the defendants on the abovementioned issues.

I

[113] I agree with learned counsel for the plaintiff's submissions on these issues and do not intend to go into every detail of the arguments put forth on behalf of the defendants for the reason stated above.

A [114] However, for completeness, I will touch upon some of them briefly and the responses given by learned counsel for the plaintiff which I agree and accept.

B *Regarding the impugned BA transactions — The BDO Reports*

[115] The defendants alleged that impugned BA transactions were based on fabrication and/or fictitious documents. The BDO reports were produced to support this allegation.

C [116] However, the BDO reports are themselves not conclusive and are confined to documents pertaining to the three impugned BAs only.

D [117] Some of the finding and conclusions of the BDO report are reproduced below:

E 6.3.3 These 19 purchase invoices with unidentifiable acknowledgement and no corresponding inventory receipts recorded in KSFISB's stock cards, were all issued by the same supplier, i.e. Secret Ingredients Sdn Bhd. We compared these purchase invoices with a purchase invoice issued by Secret Ingredients Sdn Bhd that is known to be valid. Our comparison shows differences between the invoice numbering sequence (i.e. 'SI' vs 'ZD'), the invoice numbering format (i.e. the spacing between the alphabetical and numerical portions of the invoice serial numbers) and the alignment of the detail on the company stamp as shown in the comparisons below:

F ...
6.3.4 These discrepancies *suggest* that the invoices received from Secret Ingredients Sdn Bhd for which no stock card movement is recorded are *most likely fictitious*, complete with fake serial numbers and company stamp.

G ...
11.8 *Fictitious purchases* — 19 invoices, amounting to RM2,922,263, all of which were issued by Secret Ingredients Sdn Bhd, did not have corresponding inventory receipts recorded in KSFISB's stock cards but were acknowledged by personnel whom we have not been able to identify. Discrepancies between the invoice numbering sequence, the invoice numbering format, and the alignment of the detail on the company stamp on the invoices for these purchases *suggest that these invoices are most likely fictitious*. (Emphasis added.)

I [118] It is important to note that the defendants themselves, their senior management and marketing personnel involved in the daily management and sales of the first defendant as well as their internal and external auditors, did *not* manage to detect the fictitious documents.

[119] The defendants had to appoint an expert auditor to conduct forensic examination based on the first defendant's internal records at the material time, eg, the stock cards to which the plaintiff has no knowledge nor access. A

[120] If the defendants themselves, with their own internal auditing or accounting personnel, could not detect these alleged fictitious documents which required them to specially engage external auditors, it is unreasonable for the defendants to now expect the plaintiff to have known or notice of the alleged fictitious documents. The plaintiff is entitled to accept these documents at face value (*Gian Singh & Co; Aldwich Enviro-Management*). B C

[121] To expect more of the plaintiff is akin to getting them to carry out a forensic audit on every commercial document that is submitted to them. This will lead to chaos in the banking industry, not to mention additional costs which would inevitably be passed down to the customer. D

[122] The plaintiff is not expected to take on the role of an amateur detective (*Lipkin Gorman*).

The timing of the impugned BA transactions and other events E

[123] Many issues raised by the defendants can be answered simply by looking at the chronology of events which I have set out in the salient background facts of this case. F

[124] This includes the fact that:

- (a) the change of the directors of the defendants took place before the impugned BA transactions, therefore, to argue that the new current directors were not on their Board of Directors at the time the impugned BA transactions took place is without merit; G
- (b) the reprimand by Bursa against the second defendant and its directors was issued prior to any of the impugned BA transactions and is in respect of financial years more than two years prior to the issuance of any of the impugned BA transactions; H
- (c) the first defendant had already defaulted in repayment of the facilities *before* the first impugned BA transaction took place on 26 December 2018; I
- (d) the first defendant continued to be in default of the facilities well after all three impugned BA transactions took place;
- (e) it was argued on behalf of the defendants that red flags regarding the impugned BA transactions were raised when LBB made its

- A announcements to Bursa in *September 2019*. However, prior to and even *after* these announcements, the defendants were in negotiations with the plaintiff to settle their indebtedness which includes the plaintiff's claim in this action;
- B (f) it is interesting to note that on *9 June 2020*, the issue of the unauthorised BA transactions was arguably formally raised for the *first time* by solicitors for the second defendant when Mamee withdrew from the proposal for settlement. This, however, did *not* stop the second defendant from issuing a fresh settlement proposal *despite* their knowledge or suspicion of the unauthorised BA transactions; and
- C (g) BDO was only appointed on *23 June 2020* which is about nine months after the defendants suspected or were alerted (based on LBB's announcements) that there was impropriety in the BA transactions.
- D [125] The chronology of events in itself would exclude any argument that the plaintiff was put on notice, even if it is said to apply. The defendants own conduct estops them from raising these arguments.
- E [126] In this regard the defendant cannot now attempt to raise issues regarding the impugned BA transactions retrospectively having the benefit of hindsight. The following passage from Parker LJ in *Lipkin Gorman (a firm) v Karpnale Ltd and another* [1992] 4 All ER 409 is instructive:
- F In order so to establish the customer *cannot*, of course, *rely on matters which a meticulous ex post facto examination would have brought to light*. (Emphasis added.)

THE BANK NEGARA GUIDELINES

- G [127] The issues regarding non-compliance with the Bank Negara Guidelines on Bankers' Acceptance (2004) ('BNM Guidelines') were not specifically pleaded in the defence and counterclaim and therefore ought not be taken into consideration (*United Malayan Banking Corporation; Pembinaan V-Jaya*).
- H [128] However, learned counsel for the plaintiff responded to these arguments and showed that the BNM Guidelines were complied with.
- [129] The following arguments were advanced on behalf of the defendants:
- I (a) that the plaintiff had breached its duty of care by, among others, breaching the BNM Guidelines;
- (b) that the plaintiff had failed to verify each document or sample prior to drawdown and by doing so breached its duty of care;
- (c) Secret Ingredients and the defendants are related parties as:

- (i) the plaintiff had admitted that Secret Ingredients was previously a shareholder of second defendant in 2018 whilst Secret Ingredients' majority shareholder, Kok Puh Chin, was a shareholder at the time of the drawdowns under the BA Facility; and A
- (ii) Secret Ingredients and the second defendant operated out of the same location, namely Jalan Istimewa, Taman Perindustrian Desa Cemerlang, 81800 Ulu Tiram, *Johor*. B
- (d) the plaintiff, by allowing drawdowns under the BA Facility for a fictitious transaction between related parties, had breached section 6(4) of the BNM Guidelines which states: C
 - (4) Where the *two transacting parties* are *related corporations*, a BA may still be drawn provided that the accepting bank shall take reasonable measures to verify that:
 - (i) The related corporations *are indeed separate legal entities*; and D
 - (ii) The trade transaction between the *two related corporations* was undertaken *at arm's length* and there was a genuine transfer of title to the goods concerned, *evidenced by proper and adequate documentation*. (Emphasis added.) E

[130] BA financing is governed by the BNM Guidelines which replaces the Guidelines on Bankers Acceptances and Negotiable Certificates of Deposit 1979. F

[131] A summary of the general procedure for creation of a BA is set out in the BNM Guidelines and can be seen in *OCBC Bank (Malaysia) Bhd v Siong Holdings Sdn Bhd* [1996] MLJU 253 which was based on the previous 1979 Guidelines: G

According to the BNM Guidelines, a BA is a bill of exchange in a specific standard format, which is drawn on and accepted by a commercial bank or a merchant bank in Malaysia and *is not payable on demand but payable, to the order of the drawer, on a specified future date* without days of grace, the date being not earlier than thirty days and not later than two hundred days from the date of acceptance. It is payable at the Head Office, Central Office or Main Office of a specified commercial bank in Kuala Lumpur. H

A specimen BA is given in the BNM Guidelines. It has spaces for the date of the BA, the date of acceptance and the due date. It is addressed by the drawer to a merchant bank — it could also be a commercial bank — with the essential instruction: 'At 123 days without days of grace pay to the order of ourselves the sum of ringgit seven hundred and eighty nine thousand only'. There is also a statement: 'Payable at [a commercial bank and address] for and on behalf of [the first-mentioned bank]', which is the drawee or acceptor of the BA and is therefore, by the definition in the BNM Guidelines, the accepting bank. (Emphasis added.) I

- A** [132] Learned counsel for the plaintiff explained the BA transactions as against the BNM Guidelines as follows:
- (a) according to the BNM Guidelines, ‘BA’ means a banker’s acceptance, which is a bill of exchange drawn on and accepted by a bank in Malaysia in accordance with the BNM Guidelines;
 - B**
 - (b) according to section 6 of the BNM Guidelines, a BA may be drawn on and accepted by a bank, pursuant to an acceptance credit facility, to finance the drawer’s business-related purchases from or sales of goods to another person who may be a resident or non-resident, evidenced by proper and adequate documentation;
 - C**
 - (c) a bank shall not accept a BA that is drawn to finance a sale or purchase of goods where the two parties to the trade transaction are related parties pursuant to section 6(3) of the BNM Guidelines;
 - D**
 - (d) in the present case, the BA Facility was drawn by the first defendant to finance its local purchases of goods;
 - (e) upon the acceptance of the BA by the plaintiff, the loan amount will be disbursed by the plaintiff to the first defendant’s suppliers/creditors;
 - E**
 - (f) the maturity date of the BAs, ie, for the first defendant to repay the plaintiff, is determined based on the due dates stated in the first defendant’s applications for BA;
 - F**
 - (g) section 7 of the BNM Guidelines stipulates the documents required to be presented by drawer to the accepting bank to draw on a BA, namely:
 - (i) the drawer’s declaration that no other source of finance (including under a lease, hire purchase, or factoring) has been or would be obtained for the trade transaction concerned; and
 - G**
 - (ii) the full set of commercial documents evidencing or acknowledging the trade transactions concerned unless subsection 7(2) applies.
 - (h) the BNM Guidelines define ‘commercial documents’ as invoices, transport documents (including shipping documents), documents of title or other similar documents, or any other documents whatsoever (not being financial documents).
 - H**
 - I** [133] Learned counsel for the plaintiff then explained how the BA transactions in the present case were conducted:
 - (a) all the BA application forms presented by first defendant to the plaintiff were signed by the first defendant’s authorised signatory, namely DSL, and forwarded to the plaintiff under the first defendant’s cover letters enclosing the relevant commercial documents as evidence of trades/

- purchases between the first defendant and its suppliers, ie, the invoices and delivery orders issued by its local suppliers including Secret Ingredients; A
- (b) the plaintiff had examined the commercial documents presented by the first defendant and accepted the BA upon being satisfied that the documents appear on their face to be in order for drawdown; B
- (c) the defendants' case is that the plaintiff ought to have known that the commercial documents were fictitious, and the BAs were drawn for the sole benefit of DSL and/or LBB by virtue of DSL's involvement. The defendants further contend that the plaintiff owes a duty to 'authenticate the third-party documents'; C
- (d) the defendants' aforesaid contentions are baseless and untenable. Firstly, there is *no duty* imposed on the plaintiff under the BNM Guidelines to investigate or inquire the authenticity of the commercial documents. The plaintiff merely needed to be satisfied that the commercial documents were in order *on their face*, and the BA *complied with the terms* of the acceptance credit facility and all the applicable conditions for the creation of BA; D
- (e) secondly, *none* of BAs was drawn to finance a trade transaction between the defendants and *parties related* to them including Secret Ingredients. The BNM Guidelines provide that a bank generally should not accept a BA drawn to finance a trade transaction between two related parties; E
- (f) this means that the plaintiff *only* needed to be *satisfied* that the *description* of goods stated in the invoice *matches* the *delivery order* which has been acknowledged receipt by the buyer and the amount of financing applied for is within the approved limit; and F
- (g) this is in line with section 5 of the BA Guidelines which reads as follows: G
- Procedure for Creation of a BA The general procedure for the creation of a BA is as follows:
- (i) An acceptance credit facility is arranged with the bank; H
- (ii) The required documentary evidence of trade is presented to the bank for the purpose of drawing a BA; and
- (iii) When the *bank is satisfied* that the *documents are in order* and the *BA complies with the terms of the acceptance credit facility* and all the applicable conditions for the creation of BA specified in these Guidelines, the bank accepts the BA. (Emphasis added.) I

[134] Learned counsel for the plaintiff denied that Secret Ingredients and the defendants are related parties. In this regard he referred to s 7 of the Companies

A Act 2016 which states that a corporation is deemed to be related to each other if:

(a) it is a holding company of another corporation;

B (b) it is a subsidiary of another corporation; or

(c) it is a subsidiary of the holding company of another corporation.

C [135] It was further submitted on behalf of the plaintiff that neither the second defendant nor the first defendant are the holding company of Secret Ingredients. The first defendant has *no shareholding* in Secret Ingredients. The fact that the second defendant and Secret Ingredients have one *common shareholder*, namely Kok Puh Chin, does *not* render them related parties to each other.

D [136] That in any event, Secret Ingredients was no longer a shareholder in the first defendant in 2018 during the financing period whilst Kok Puh Chin's shareholding in second defendant was only 0.69% which was insignificant at the time of drawdown.

E [137] These shareholding facts were *not* disputed by the defendants.

F [138] It was further submitted by learned counsel for the plaintiff that the defendants' allegation that Secret Ingredients and the defendants operated out of the same address in Johor, is grossly misleading. The defendants' place of business is in Sri Kembangan, *Selangor*.

G [139] I am satisfied, based on learned counsel for the plaintiff's abovesaid submissions and the affidavit evidence, that the plaintiff had complied with the applicable BNM Guidelines in respect of the BA transactions.

H [140] Further, based on the authorities previously cited, the plaintiff is entitled to accept the commercial documents submitted by the first defendant as valid and in order on the face of those documents (*Gian Singh & Co; Aldwich Enviro-Management*).

I [141] The plaintiff has no duty to inquire or investigate into these documents (*Chang Yun Tai; Lipkin Gorman*).

[142] It is important to again highlighted that the defendants themselves had to engage an external auditor to forensically discover the alleged fictitious documents which findings are not even conclusive, however, the defendants'

argue that the plaintiff ought to have known about said the alleged fictitious documents or had notice of them. This is not only untenable but it is also unreasonable.

A

THE DEFENDANTS' ACTION AGAINST DSL — APPROBATE AND REPROBATE

B

[143] It is strange, to say the least, that the defendants would file a counterclaim against the plaintiff for negligence in respect of the impugned BA transactions and also commence an action against DSL on the allegation that he was responsible for the impugned BA transactions.

C

[144] It is trite that a party cannot claim benefit from a transaction/contract and at the same time seek to invalidate it (*Verschures Creameries, Limited v Hull and Netherlands Steamship Company, Limited* [1921] 2 KB 608).

D

[145] The defendants cannot be allowed to approbate and reprobate, and claim restitution of monies paid on the alleged fictitious transactions and on the other hand seek to invalidate the BA transactions.

CONCLUSION

E

[146] The facilities granted and the funds paid out in favour of the first defendant are not disputed. The actual dispute is the impugned BA transactions which the defendants' claim there may be more of such alleged unauthorised BA transactions.

F

[147] The defendants' defence to the plaintiff's claim is that the plaintiff were negligent and had breached the *Quincecare* duty. I have decided the *Quincecare* duty does not apply in this case.

G

[148] None of the issues raised by the defendants in this case are triable issues. There is also no conflict of evidence as to facts (*Seruan Gemilang*).

[149] Insofar as the counterclaim is concerned the defendants' counterclaim is also based on the *Quincecare* duty which they sought to impose on the plaintiff. The *Quincecare* duty is not applicable in this case and thus the counterclaim is thus bound to fail (*Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16; [1993] 3 CLJ 606).

H

I

[150] Notwithstanding that the defendants have no cause of action against the plaintiff or that their counterclaim is frivolous, vexatious or otherwise an abuse of the process of court, I also found that the second defendant, as a

A guarantor, has no right to its counterclaim against the plaintiff. The second defendant is not a party to the BA Facility and cannot be said to have suffered any loss (*Talam Corp Bhd & Anor v Bangkok Bank Bhd & Anor* [2016] 6 MLJ 61; [2016] MLRAU 1 and *Malayan Banking Bhd v Lim Poh Ho & Anor* [1997] 1 MLJ 662; [1997] 2 CLJ 516).

B [151] Based on the reasons that I have set out above, I allowed both the plaintiff's applications and after hearing arguments on costs, awarded costs of RM10,000 for the plaintiff's O 14 application and RM10,000 for the plaintiff's O 18 application in favour of the plaintiff.

C *Applications (encl 9 & 12) allowed with costs.*

Reported by K Selvaraju

D

E

F

G

H

I